

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Department of Employment Services**

**VINCENT C. GRAY**  
**MAYOR**



**LISA MARÍA MALLORY**  
**DIRECTOR**

**COMPENSATION REVIEW BOARD**

**CRB No. 13-026**

**SUSAN P. INGAGLIATO,**  
**Claimant–Respondent,**

**v.**

**SIBLEY MEMORIAL HOSPITAL,**  
**Self-Insured Employer–Petitioner.**

Appeal from a February 25, 2013 Compensation Order on Remand by  
Administrative Law Judge Anand K. Verma  
AHD No. 02-432A, OWC No. 534522

Charles V. Krikawa, IV, Esquire, for the Claimant/Respondent  
D. Stephenson Schwinn, Esquire, for the Self-Insured Employer/Petitioner

Before: JEFFREY P. RUSSELL, HENRY W. MCCOY, and HEATHER C. LESLIE, *Administrative Appeals Judges*.

JEFFREY P. RUSSELL, *Administrative Appeals Judge*, for the Compensation Review Board.

**DECISION AND ORDER**

**BACKGROUND**

On December 31, 1998 Respondent Susan P. Ingagliato (Ms. Ingagliato or Claimant) was injured while employed by Sibley Memorial Hospital (Sibley or Employer) as a registered nurse. She filed a claim for compensation benefits she ultimately resolved by way of an Agreement of Final Compromise and Settlement, in which she retained the right to obtain future causally related medical care.

She has been receiving treatment from Dr. Justin Wasserman for management of her chronic pain, which treatment includes administration of 5 mg of methadone daily. Sibley challenged the reasonableness and necessity of this ongoing care, and obtained a utilization review (UR) report, authored by Dr. Yusuf Mosuro, in which Dr. Mosuro opined that the ongoing pain management regimen, including the methadone, was not medically reasonable and necessary. The parties presented the matter for resolution to an Administrative Law Judge (ALJ) in the Department of Employment Services (DOES). Following a formal hearing the ALJ issued a Compensation Order

on October 24, 2012, in which the pain management regimen was found to be reasonable and necessary. Sibley appealed, to which appeal Ms. Ingagliato filed an opposition.

On January 25, 2013, the Compensation Review Board (CRB) issued a Decision and Remand Order. The CRB rejected Sibley's arguments that the ALJ, in considering the competing opinions of Dr. Wasserman and the UR provider improperly gave each opinion equal initial weight, i.e., the CRB rejected the position that UR opinion ought to be accorded an initial preference over treating physician opinion in the same manner that treating physician opinion is entitled to an initial preference over Independent Medical Evaluation (IME) opinion. The CRB also rejected Sibley's argument that the ALJ's rejection of the conclusions of the UR report was premised upon either a misreading or misunderstanding of the contents of the UR report.

However, the CRB agreed that the language employed throughout the Compensation Order evinced a misunderstanding of the analytic process by which the evidence should be evaluated, and that the ALJ impermissibly placed the burden of proof upon Sibley to disprove the reasonableness and necessity of the ongoing pain management using methadone. The matter was remanded with instructions to further consider the evidence, making clear that the burden of proof was properly allocated such that Ms. Ingagliato retained that burden, by a preponderance of the evidence.

On February 5, 2013, the ALJ issued a Compensation Order on Remand, again allowing Ms. Ingagliato to continue to obtain the care as recommended by Dr. Wasserman. Sibley appealed the Compensation Order on Remand, which appeal Ms. Ingagliato opposes.

We affirm the Compensation Order on Remand.

#### STANDARD OF REVIEW

The scope of review by the CRB, as established by the Act and as contained in the governing regulations, is limited to making a determination as to whether the factual findings of the Compensation Order are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law.<sup>1</sup> See D.C. Workers' Compensation Act of 1979, as amended, D.C. Code §§ 32-1501 to 32-1545 (the "Act"), at § 32-1521.01(d)(2)(A). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

#### ANALYSIS

We start by noting that in the Compensation Order on Remand, the ALJ has cited a case that he erroneously refers to as *Crawford v. Director of Workers' Compensation*, 932 A.2d 152 (2d Cir.

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<sup>1</sup> "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott International v. D.C. Dept. of Employment Services*, 834 A.2d 882 (D.C. 2003).

1991), which we have determined is more than likely a reference to *Crawford v. Director, OWCP*, 932 F.2d 152 (2d Cir. 1991), to support his misapprehension as to the correct burden of proof to be applied to cases under D.C. Code § 32-1501 *et seq.*, the District of Columbia Workers' Compensation Act (the Act). It is a workers' compensation case, arising under the Longshore and Harbor Workers' Compensation Act, (33 U.S.C. § 901, *et seq.*)(LHWCA), but it has absolutely nothing to say about "*prima facie*" cases, or their being overcome by substantial evidence.

Even if it did, the ALJ proceeds under the mistaken impression that a Second Circuit federal LHWCA case is controlling authority in this jurisdiction. We remind the ALJ that LHWCA cases, particularly from our own federal Circuit, may have persuasive authority in cases arising under the Act, but only where there is a lack of existing law in this jurisdiction on the subject in question (which is not the situation in this case) and that at a minimum an adjudicatory body that seeks to rely upon this variety of persuasive authority must explain in some detail why this authority is so persuasive. Such an explanation requires at least a minimal distillation of the facts of the case and discussion of how the case at hand is similar to the case being cited, and why the outcome should be same. The Compensation Order on Remand under review contains no such information or analysis.

Further, even if the standard (or evaluative scheme) that the ALJ seeks to impose in this case were proper, it is manifest error to assert that Sibley has not produced substantial evidence in opposition to the reasonableness and necessity of the ongoing administration of opiates. It has produced an IME report from Dr. Levitt and a UR report from Dr. Mosuro to that effect. Sibley's evidence is "such evidence as a reasonable person might accept" to support the proposition that the continued administration of opiate medication to this patient is not medically reasonable or necessary.

The ALJ's persistence in asserting that the burden of proof is as he describes it suggests a lack of understanding of a basic legal truth: there can be substantial evidence supporting *both* sides of a disputed issue. The scheme that the ALJ appears to be emulating echoes that employed when analyzing the issue of medical causal relationship where there are competing medical opinions. If the ALJ truly understood the proper use of "substantial evidence" in that exercise, he would recognize that ultimately, the question comes down to a preponderance standard.

The burden of proof to establish the reasonableness and necessity of the disputed medical care is upon the claimant, and that burden is by a preponderance of the evidence.

A comparative review of the original Compensation Order and the Compensation Order on Remand reveals that they are in most respects, identical. There are a few minor stylistic changes, but for reasons we do not understand, it persists in employing an analysis that, as framed, finds in favor of the Ms. Ingagliato because the ALJ asserts that Sibley has failed to adduce substantial evidence that the methadone treatment regimen is not reasonable and necessary, a facially inaccurate statement, and nowhere does the ALJ ever state the correct burden of proof.

There are some differences that we can detect of substance: the addition to the Findings of Fact the following sentences: "The treatment protocol prescribed by Dr. Wasserman was not inconsistent with the ODG. The UR physician's opinion was not substantial evidence to rebut Claimant's *prima facie* showing of reasonableness and necessity of recommended treatment by Dr. Wasserman"; and the addition in the Discussion of "Thus, in light of Dr. Wasserman's findings consistent with the

ODG requirements, the UR physician's opinion is not deemed substantial evidence to rebut Claimant's *prima facie* case."

Most notably, though, the Compensation Order on Remand contains one additional significant change in the Conclusion of Law. In the original Compensation Order, the ALJ wrote:

Premised on the adduced evidence, the undersigned concludes employer has not sustained its burden under the Act of proving that Dr. Wasserman's recommended treatment, including the prescription of Methadone 5 mg, is not reasonable and necessary.

It was this language more than any other that prevented us from finding the repeated misstatements in the original Compensation Order concerning the burden of proof to be harmless error. It was an unmistakable indication of not only a misunderstanding, but a misallocation of the burden of proof.

However, in the Compensation Order on Remand, the ALJ wrote in the Conclusion of Law:

Premised on the adduced evidence, the undersigned concludes Claimant has established a *prima facie* case of reasonableness and necessity of her continued treatment with methadone, which Employer has failed to rebut by substantial evidence.

The ALJ has eliminated from the Compensation Order on Remand the language specifically and erroneously assigning the burden of dis-proof to Sibley.

Despite persisting in employing "*prima facie*" showings and "substantial evidence" rebuttal in inaccurate ways, with the excision of the misallocation of the burden of proof, the Compensation Order on Remand's actual structure and content now amounts to a simple consideration of the merits of each side's evidence, and a determination that Sibley's evidence is inferior to Ms. Ingagliato's. As long as the ALJ has conducted what amounts to a weighing of the evidence, which he did in this case, the misstatements as to nomenclature of the steps in the process can be deemed harmless.

The removal of the reference to "Employer's burden under the Act" from the Conclusion of Law is sufficient for us to accept that the ALJ weighed the evidence and found it to preponderate in Ms. Ingagliato's favor. The references to Sibley's failure to adduce substantial evidence in opposition to Ms. Ingagliato's claim, although erroneous, were in this case harmless.

CONCLUSION AND ORDER

The misstatements as to the analytic framework to be employed in considering the claims raised in this case were harmless error. The Compensation Order on Remand is affirmed.

FOR THE COMPENSATION REVIEW BOARD:

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JEFFREY P. RUSSELL  
Administrative Appeals Judge

May 6, 2013  
DATE